83-972

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, as Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, BURLINGTON NORTHERN, INC., and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUES PRESENTED

In the opinion of the petitioner, the following issues are presented by this petition:

1. Did the Court of Appeals err in affirming an order of the Milwaukee Reorganization Court, denying protection to certain employees of the Burlington Northern and Union Pacific Railroads required by Section 5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C., § 904(b)(1)) upon court approval of the sale of Milwaukee lines to the other carriers based upon an interpretation of a collective bargaining agreement between RLEA and its affiliated unions and the carriers in violation of the provisions of Section 3 of the Railway Labor Act conferring exclusive jurisdiction to interpret such an agreement by an adjustment board provided by that Act for such purpose?

2. Did the Court of Appeals err in affirming an order of the Milwaukee Reorganization court which provided protection to Milwaukee employees who had opted for the statutory protections of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C., § 904(b)(1)) as permitted by Section 9 of that statute (45 U.S.C., § 908) but deferred such protections without balancing the equities to determine if such deferral was required to ensure reorganization of the Milwaukee Railroad as required by both the Third Circuit and the Seventh Circuit?"

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The petitioner, Railway Labor Executives' Association ("RLEA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 15, 1983, affirming a final order and judgment of the United States District Court for the Northern District of Illinois sitting as a Railroad Reorganization Court under Section 77 of the Bankruptcy Act, with respect to the protection of employees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Burlington Northern, Inc., and the Union Pacific Railroad adversely affected by the sale of Milwaukee lines to the Burlington Northern and Union Pacific, as required by Section

5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C. § 904(b)(1)).

OPINIONS BELOW

The opinion of the Court of Appeals (hereinafter "App. — "), not yet reported, is reproduced herein as Appendix C. The orders of the Reorganization Court, dated March 19,1982, and June 18, 1982, also not reported, are reproduced in App. B and B-1 hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 15, 1983, (App. C). This petition is governed by the provisions of Title 28, Section 1254(1) and 2101(c) of the United States Code and Rule 20(2) of the Revised Rules of this Court which require the petition to be filed within ninety (90) days after the entry of the judgment of the Court of Appeals for which review is sought.

This Court has extended the time within which to file this petition to and including December 12, 1983 (App. A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case primarily involves the interpretation and application of the provisions of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act, which requires the Milwaukee Reorganization Court, in authorizing a sale or transfer of a line of the Milwaukee Railroad to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code. Section 5(b)(1) reads as follows:

> (b)(1) Upon the occurrence of an event described in section 22(b) of this Act, on April 1, 1980, whichever

> first occurs, the bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code.

Section 11347 reads as follows:

> "When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title [49 USC §§ 11344, 11345, 11346], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45 [45 USC § 565]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lessor period).

49 U.S.C., § 11347. Other consititutional or statutory provisions referred to are either quoted in context or in the appendix hereto.

STATEMENT OF THE CASE

This case involves the interpretation and application of Section 5(b)(1) of the Milwaukee Railroad Restructuring

Act (hereinafter, "MRRA"), 45 U.S.C. Section 904(b)(1), which provides that whenever the court sitting as a Railroad Reorganization Court for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (hereinafter, "MILW") under Section 77 of the Bankruptcy Act (11 U.S.C., Section 205), authorizes any sale or transfer of the MILW lines for use in continued rail operations, "the court shall provide a fair arrangement at least as protective of the interest of employees as that required under" Section 11347 of the Interstate Commerce Act (49 U.S.C., § 11347), and the jurisdiction of the Reorganization Court to interpret a collective bargaining agreement between petitioner and its affiliated unions and the BN and UP known as the Hiring Agreement. The case arose because (1) the Reorganization Court, approved the sale of approximately 500 miles of MILW line to the Burlington Northern, Inc. (hereinafter, "BN") and the Union Pacific Railroad Company (hereinafter, "UP") and, in disregard of the requirements of Section 5(b)(1) of MRRA, failed to provide *any protection at all* for a group of BN and UP employees subject to adverse effects by the sale, and (2) although the Reorganization Court provided some protection for MILW employees, who had opted for statutory protections as against severance pay as authorized by the statute, the court deferred the protective benefits without determining the need therefore as required by Section 5(b)(1) of the MRRA.

Originally incorporated as the Milwaukee & Waukesha Railroad Company in 1847, the MILW grew over the years by expansions and by acquisitions so that by 1977 it was the seventh largest railroad in this country, operating over 9,800 miles of rail lines in sixteen (16) states. *Chicago, M.St.P.&P.R.—Reorganization*, 363 I.C.C. 17, 24 (1980). By 1979, the MILW employed over 10,000 employees to operate its system, most of whom were

represented by member organizations of RLEA. However, competition and a deteriorating financial conditions caused the MILW on December 19, 1977, to seek relief under Section 77 of the Bankruptcy Act (11 U.S.C., Section 205). In April, 1979, it sought permission to "embargo" approximately two-thirds of its system. On September 27, 1979, the Reorganization Court authorized that embargo, effective November 1, 1979. Several days thereafter, the Court of Appeals upheld the authority of a Section 77 Reorganization Court to authorize the suspension of operations over a portion of a debtor's system. *In re Chicago, M.St.P.&P.R.*, 611 F.2d 662 (7th Cir. 1979).

Faced with such a massive cessation of essential rail transportation, Congress passed the MRRA on November 2, 1979,[1] and in that Act provided for

> emergency measures . . . [that] must be taken to restructure the Milwaukee Railroad and to avoid the potential unemployment and damage to the economy of the region and of the Nation which a cessation of essential services by the Milwaukee Railroad would otherwise cause.

45 U.S.C., Section 901(b).

Section 5(b) of the MRRA gave the Reorganization Court authority to control the time in which the ICC could consider applications to sell or to transfer MILW property for continued rail usage. That subsection also made the Reorganization Court the forum in which to review the ICC's actions on a sale or transfer application; limited the scope of that review; gave the court the authority to authorize interim operations; and gave the court the authority to authorize any such sale or transfer approved by the ICC.

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[1] The MRRA was signed into law on November 4, 1979, as Pub.L. No. 96-101.

At the same time Congress in Section 5(b)(1) conditioned the authority granted to the MILW Reorganization Court with a requirement that the court protect the interests of employees. Section 5(b)(1) provides:

> "In authorizing any such sale or transfer, the court shall provide a fair arrangement at least a protective of the interests of empolyees as that required under section 11347 of title 49 of the United States Code,"

In March 1980, the MILW Trustee agreed to sell to the BN for $21 million about thirty (30) parcels of track and yards located in seven (7) states. Shortly after that agreement was reached, the Trustee reached an agreement with the UP to sell eight yard and track segments to that carrier for $19 million. Approximately 400 miles of track were sold to the BN, while 100 miles went to the UP. The Trustee separately sought preliminary approval of each sale from the MILW Reorganization Court under Section 5(b)(3) of the MRRA (45 U.S.C. § 904(b)(3)). The court gave its preliminary approval to each sale, and also authorized the carriers, pursuant to Section 5(b)(3) of the MRRA, to operate the properties to be acquired pending consideration by the Interstate Commerce Commission (hereinafter, "ICC" or "Commission") of their purchase applications. On October 24, 1980, the Reorganization Court gave its final aproval to the sale proposals.

Petitioner RLEA contended before the Reorganization Court, that, if it were to approve the sales, the Court must comply with Section 5(b)(1) of the MRRA by imposing "a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. § 11347]. . . ." 45 U.S.C. § 904(b)(1). The court rejected RLEA's arguments by stating that its prior abandonment orders provided the necessary protection for terminated MILW employees, and that if some of those

employees were subsequently "hired for operating the acquisitions, they of course need no further labor protection." RLEA also argued that the employee protections mandated by Section 5(b)(1) of the MRRA must cover BN and UP employees. The Reorganization Court also rejected that argument on the grounds that "the BN and UP employees are not subject to the Milwaukee Railroad Restructuring Act." Thus, no employee protective provisions were included in the court's final approval order. RLEA, therefore, appealed that order to the Seventh Circuit in Case No. 80-2735.

After RLEA filed its brief in such appeal, the Trustee, the BN, and RLEA[2] agreed that the appeal should be remanded to the Reorganization Court "for the limited purpose of reconsidering [Order No. 409] . . . as it deals with employee protection." 7th Cir. No. 80-2735, Order dated May 26, 1981. On May 26, 1981, the Court of Appeals remanded the case to the Reorganization Court.

Upon remand, the Reorganization Court permitted RLEA to serve interrogatories upon the Trustee, the BN, and the UP in order to enable RLEA to develop the actual impact of the transaction upon their empolyees. The interrogatory answers of both the BN and the UP showed that the sales of MILW lines involved could adversely affect BN and UP employees outside of the zone or working district of the acquired lines, because employees working in zones or districts immediately impacted by the sales had seniority rights in other zones or districts which could be exercised to jobs in those districts.

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[2] The UP did not enter an appearance in No. 80-2735, and did not participate in the Rule 33 conference which led to the remand order.

Petitioner RLEA argued to the Reorganization Court that Section 5(b)(1) of MRRA required the imposition of at least the *New York Dock* conditions previously determined by the Interstate Commerce Commission as required by the Interstate Commerce Act (49 U.S.C., § 11347) for the protection of all MILW, BN, and UP employees affected by the sales, except for those employees who were covered by the terms of a March 4, 1980 Hiring Agreement. *New York Dock Ry.—Control—Brooklyn E.D.T.*, 360 I.C.C. 60 (1979), *aff'd*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (1979).

This agreement, between purchasing carriers and RLEA's affiliated unions, reproduced in Exhibit E hereto, dated March 4, 1980, provided a limited monetary protection. *See*, H.Rpt. No. 96-838, 96th Congress, 2d Sess. at 53-62 (1980). Those monetary protections were "substantially less protective than the protective conditions under the *New York Dock Railway* case" (H.Rpt. No. 96-839, *supra*, at 22). The agreement provided that it should be the complete protection for bankrupt carrier employees and a purchasing carrier would have no other obligation to other bankrupt carrier employees. As Congress indicated, labor had made those concessions in order to maximize the number of MILW and Rock Island employees hired by other carriers who took over MILW or Rock Island operations. *Id.* Both the BN and UP were parties to that Hiring Agreement.

The agreement also covered employees of the purchasing carriers who were "(1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs (*Id.* at Article III, § 1, reproduced at H.Rpt. No. 96-839, *supra*, at 57). All other purchasing

carrier employees, however, were not covered. Thus, BN and UP employees working in a seniority district outside of a zone or working district of the purchased property were not included.

On March 19, 1982, the Reorganization Court rejected the RLEA's position and imposed employee protective conditions suggested by the Trustee for MILW employees who had opted for statutory benefits which accorded less protection than that determined by the ICC as required by the Interstate Commerce Act. 49 U.S.C. § 11347. Moreover, payment of those benefits were ordered to be deferred until some later date. Finally, the protections of BN and UP employees were limited to the March 4, 1980 Hiring Agreement which did not include BN and UP employees who were employed outside the immediately impacted work zones or districts of the two carriers (App. E, Art. III, Section 1).[3]

Petitioner RLEA immediately sought reconsideration or clarification of that portion of the order dealing with the protection to be afforded BN and UP employees. While its motion was pending, RLEA, on April 14, 1982, filed a timely appeal from the order of the Reorganization Court and RLEA's appeal in Docket No. 82-1637 followed.

On June 18, 1982, the Reorganization Court issued a minute order denying RLEA's request stating:

> The Motion of RLEA for Reconsideration of Order No. 409-A is hereby denied on the grounds that said motion presents no new issues of law or fact for consideration by this court. The Court further finds that said order is not ambiguous; *it clearly excludes*

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[3] App. B and B-1.

from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee (Emphasis supplied).

(App. B-1).

The decision and judgment of the Court of Appeals affirmed the judgment of the Reorganization Court. App. C.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Affirming The Order Of The Reorganization Court Denying Statutory Protections To Employees Of The BN And UP Working In Seniority Zones Or Districts Other Than The Purchased Properties Based On An Interpretation Of The Hiring Agreement, Because Neither The Lower Court Nor The Court Of Appeals Had Jurisdiction To Interpret A Railroad Agreement Upon Which The Decision Was Based

Section 5(b)(1) of the MRRA[4] clearly requires in plain and unambiguous language that the Reorganization Court in authorizing a sale or transfer of MILW lines must "provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code, *i.e.*, the Interstate Commerce Act. (App. D hereto). Section 11347, in turn (App. D hereto) provides for a "fair arrangement" for the protection of the "interest of employees who are affected" by a transaction when a railroad is involved in the transaction for which approval of the Interstate Commerce Commission is sought. It is beyond question that Section 11347 requires that both the selling and purchasing carrier employees be protected. Not only does the language require protection for "em-

[4] Quoted in full in Appendix D hereto.

ployees affected by the transaction" without any limitation as to seller or buyer, it also speaks of transactions in which "a railroad is involved" thus reaching both the seller MILW and buyer BN and UP. Moreover,the Interstate Commerce Commission has so interpreted the statute. *E.g., Burlington Northern, Inc. - Control - St. Louis San Francisco Ry.*, 360 I.C.C. 783, 948 (1980), *aff'd., Missouri K.T.R.* v. *United States*, 632 F.2d 392 (5th Cir. 1980); *cert. den.*, 451 U.S. 1017. However, the Reorganization Court in its original decision of March 24, 1980, on employee protection for BN and UP employees (App. B-2) rejected such protection on the ground that "Obviously the BN and UP are not subject to the Milwaukee Railroad Restructuring Act." The error in the court's conclusion was itself so obvious that when RLEA appealed the decision, both BN and the Trustee for the MILW agreed to a remand to reconsider the issue of employee protection. On remand, the court shifted grounds and granted protection to BN and UP employees in working zones or districts of purchased lines. However, the Reorganization Court order, as stated in a clarification minute order (App. B-1), "clearly excludes from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee." Such exclusion was based on an erroneous interpretation of a "Hiring Agreement" between RLEA and carriers purchasing MILW lines to which BN and UP were parties as providing the only protection to be accorded BN and UP employees. Such an interpretation was made in violation of the requirements of Section 3 of the Railway Labor Act (45 U.S.C., § 153) which confers exclusive jurisdiction to interpret collective bargaining agreements.

BN stated that the Hiring Agreement was intended by the parties to it to constitute "a complete and binding

statement of the employee protection obligations of purchasing carriers to their own employees and for the Milwaukee employees they hired." (BN Reply Memorandum, dated January 18, 1982, at 11-12). Petitioner RLEA disputed that construction of the language and intent of the Hiring Agreement and directed the Reorganization Court's attention to those portions of the agreement which RLEA asserted supported its contention that the Hiring Agreement was intended to be a complete resolution of the purchasing carrier's labor protection obligations to bankrupt carrier employees (*e.g.*, Appendix D at Article 1, § 2(a)), but was not intended to be a final resolution of *all* labor protective concerns of purchasing carriers. Reply Mem. of RLEA, dated January 28, 1982. The Reorganization Court examined the provisions of the agreement and construed it as constituting a complete statement of the BN's and UP's obligations to protect employees affected by the sales. (App. B). Petitioner RLEA respectfully submits that besides improperly depriving employees of protections mandated by Sections 5(b)(1) of the MRRA, the Reorganization Court's foray into the area of interpreting Railway Labor Act agreements improperly usurped the exclusive jurisdiction of adjustment boards under the Railway Labor Act (45 U.S.C. § 151, *et seq.*), to interpret the terms of a collective bargaining agreement.

Disputes over the interpretation or application of existing agreements under the Railway Labor Act are "minor disputes" (*e.g.*, *Elgin, J.&E. Ry.* v. *Burley*, 325 U.S. 711, 722-28 (1945)), and if such a dispute cannot be resolved by agreement, it must be submitted to an adjustment board under the Act if either party so requests. *Brotherhood of Railroad Trainmen* v. *Chicago R.&I.R.*, 353 U.S. 30 (1957). An adjustment board's jurisdiction to resolve minor disputes under the Railway Labor Act is

exclusive; federal courts do not have the subject matter jurisdiction to examine the merits of a dispute over construction of a Railway Labor Act agreement. *Andrews* v. *Louisville & Nashville R.*, 406 U.S. 320, 322-24 (1972).

The March 4, 1980 Hiring Agreement is an agreement entered into under the Railway Labor Act. That conclusion is indisputable since the source of rail labor's authority to bargain for that agreement is their exclusive representation status under the Railway Labor Act (45 U.S.C. § 152, Fourth), and the agreement itself is one concerning rates of pay, rules and working conditions of employees. *E.g.*, *Order of Railroad Telegraphers* v. *Chicago & N.W.R.*, 362 U.S. 330 (1960). Also, the dispute over the scope of the Hiring Agreement is obviously a "minor" dispute because it concerns the interpretation of the terms and intent of a Railway Labor Act agreement. *Brotherhood of Railroad Trainmen* v. *Chicago R.&I.R.*, *supra*. Consequently, the Reorganization Court, appellant RLEA submits, did not have the subject matter jurisdiction to resolve that dispute over the intended scope of the Hiring Agreement.

This does not mean, however, that the Reorganization Court could not examine the impact of that dispute on its obligations under Section 5(b)(1) of the MRRA to provide a fair arrangement to protect all MILW, BN, and UP employees affected by the transactions. RLEA respectfully submits that the court was required by the applicable case law to assume for purposes of its application of Section 5(b)(1) that both interpretations could be correct and refer the dispute for settlement by an adjustment board.

The Court of Appeals found that the petitioner did not make a timely request for reference of the dispute over the interpretation of the Hiring Agreement and thus

waived the issue. The Court of Appeals founded its conclusion on the alleged fact that RLEA twice requested the Reorganization Court to interpret the contract. The Court is now in error in so stating. The record shows that it was the BN who made the request. *See, supra*, page 7. Moreover, the law is clear that jurisdictional issues cannot be waived and that the parties could not confer subject matter jurisdiction on the Reorganization Court to interpret the agreement even if they had all joined in a request. *Insurance Corporation of Ireland, Ltd.* v. *Compagnie des Bauxites*, 456 U.S. 694 (1982). In that case, this Court stated:

> Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art III, § 1. Subject-matter jurisdiction, then, is an Art III as well as a statutory requirement; it functions as a restriction on a federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "*[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, deny its jurisdiction, and, in the*

> *exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.*" (Emphasis supplied.) (Citations omitted.)

Id. at 701.

The Court of Appeals decision (App. C) also seeks to justify the action of the Reorganization Court on the basis that the Hiring Agreement is a mixture of both a Railway Labor Act and a MRRA, Section 9, agreement. From this springboard, the Court of Appeals decision concludes that it "seems unlikely" that Congress wanted a dispute over a Section 9 agreement to be decided by arbitration subject to the extremely narrow judicial review provided for Railway Labor Act arbitration awards by 45 U.S.C., Section 153. It bases its conclusion on (a) a claim that referral to a Railway Labor Act board would string out the process, (b) that the main reason for arbitration of agreements under the Railway Labor Act is that arbitrators "are better at the task than courts" and that such reason is not applicable to a Reorganization Court which acquires an expertise as to the labor relations of the railroad in reorganization, and (c) RLEA is not asserting an exclusive jurisdiction arising out of the line of cases represented by *Andrews*, but only a primary jurisdiction claim under which a court can at its discretion refer an issue to another forum. None of these grounds for affirming the Reorganization Court are valid.

First: there is a long history of compulsory arbitration of agreements between railroads and its employees based on the 1933 amendments to the Railway Labor Act in Section 3 (45 U.S.C. § 153) and set forth by this Court in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R.*, 353 U.S. 30 (1957). The Interstate Commerce Commission has followed this established principle for the resolu-

tion of disputes over the interpretation of employee protections. *New Orleans & Northeastern R. Co.* v. *Bozeman*, 312 F.2d 264 (5th Cir. 1963). It would require some definitive statement of Congressional intent in the adoption of MRRA, which provided for the same protections, to change the long established forum for resolution of railroad agreement disputes from arbitration boards to a court. There is no such statement.

Second: the argument as to the need for speed made to support the Court of Appeals conclusion is wholly without merit since Congress in 1966 created Public Law Boards specially appointed by the National Mediation Board to supplement the National Board and apply speed where needed. (45 U.S.C. § 153, Second).

Third: the argument of the Court of Appeals decision that the main reasons for Railway Labor Act arbitration of agreements is the greater expertise of arbitration of the subject matter, which is not true in the case of Reorganization Courts, lacks merit because regardless of the capabilities of a particular court, it is not possible for such a court with its varied subject matter calendar to acquire the expertise of a specialist in the field of arbitrating labor agreements. Moreover, judicial economy is also an important consideration. If the National Railroad Adjustment Board was so overwhelmed with cases as to require the creation of individual boards by Congress in 1966, the burden on federal courts would have been even greater.

Fourth: The efforts of the Court of Appeals decision to avoid the problem by designating it an issue of "primary jurisdiction" in which the discretion of the lower court seeks to be invoked are also without merit. The issue is one of the *exclusive jurisdiction* of adjustment boards to interpret agreements subject to the review process of the statute.

II. The Reorganization Court Erred In Deferring Protective Benefits For Milwaukee Employees Who Opted For Statutory Protection Rather Than Severance Pay Because The Decision Is In Violation Of The Duties Of A Reorganization Court As Established In Other Circuits

The Reorganization Court provided protective benefits for those MILW employees who had opted for statutory protection pursuant to Section 9 of MRRA, but deferred such benefits indefinitely. This action was based on a decision of the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pac. R.*, 658 F.2d 1149 (1981), *cert. den.*, 455 U.S. 1000 (1982), hereinafter referred to as the *Milwaukee Appeals* case interpreting the MRRA as requiring such deferrals. RLEA here contended to the Court of Appeals that its decision in the *Milwaukee Appeals* case was no longer viable because of this Court's decision in *RLEA* v. *Gibbons*, 455 U.S. 457 (1982) which held provisions of the *Rock Island Transition and Employee Assistance Act* (45 U.S.C., Sections 1005 and 1008) unconstitutional under Article 1, Section 8, Clause 4 of the United States Constitution because such provisions were bankruptcy laws applicable only to one debtor. The Court of Appeals decision marches up and down several hills with respect to this issue and alights permanently on none. Finally, the decision concludes that if the Court were certain of a lack of standing in the MILW employees involved, it would rest its decision with respect to the issue on that ground but declines to do so because the decision states "We are not so certain as to be able to place our decision on that ground." It, therefore, alights at long last on an alternative interpretation of the MRRA "that eliminates any problem created by *Gibbons*. That alternative is that the MRRA did not require deferrals of employee benefits after all because Congress assumed the power to defer as an equitable power of the Reorganiza-

tion Court so that MILW employees electing statutory benefits could be confident that the court would exercise such equitable power to defer payment thereof which would in turn discourage employees from opting for such benefits. Therefore, the Court of Appeals concludes that the MRRA can be read as not providing for deferral, thus giving rise to no lack of uniformity under the bankruptcy laws.

This labored exercise comes to naught because it fails to answer the basic problem raised by RLEA that the equitable powers upon which the Court of Appeals finally rests the authority of the Reorganization Court to defer, require that court to reexamine whether the deferral of any employee benefits at this stage is required to assure that the Section 77 railroad reorganization is completed. *In re Penn Central*, 452 F.2d 1107 (3rd Cir. 1971), *cert. den.*, 406 U.S. 944 (1972). RLEA sought such a reexamination by the Reorganization Court. That Court declined to do so in spite of the clear need therefore.

When the MILW was in its most desperate hour, it projected that to survive it would have to reduce its rail system by two-thirds and that it would have to cut its labor force from over 11,000 employees to between 5,800 and 6,000 people. Plan of Reorganization, dated August 10, 1979, at 5, 10, 27 and 28. If traditional employee protective benefits were required to be paid to effectuate such a reduction, the Trustee estimated, the estate would be required to spend approximately $325 million over the six-year protective period of those traditional protections. *Id.* at 50-51. Such a massive cost, the Trustee concluded, would prevent a reorganization of the estate. *Id.* at 51. Based on similar assertions, the *Milwaukee Appeals* panel upheld the deferral of traditional employee protection claims.

As the Trustee reported in his Revised Plan of Reorganization, dated September 15, 1981, the transition to the new MILW was almost complete by late 1981. By September 1981, the work force had been reduced to 7,400; also, 2,219 claims had been filed against the estate for employee protection benefits due to those reductions. *Id.* at 17. 1,852 of those claims were under the alternative employee protection program (*Id.*), but as of September 15, 1982, only 74 employees had, in effect, elected the traditional employee protective benefits "with claims totaling approximately $4.7 million . . . ." *Id.* Eleven of those MILW employees are, RLEA assumes, the eleven who were affected by the sales at bar and who are still eligible for traditional benefits. And assuming that all things remain constant and are proportional, if the total employee protection cost for those eleven employees under MRRA Section 5(b)(1) is $1.4 million, the total of all MRRA Section 5 employee protection claims would be approximately $10 million over a six year period, excluding medical expenses. Surely, the payment of such an amount over a period of several years will not destroy the MILW's chances to reorganize successfully, especially when it is remembered that the interest earned by the property sales escrow accounts in 1981 alone would cover such an expenditure.

In his Revised Plan of Reorganization, the Trustee noted that he forecasted an additional reduction of 1,000 people in this work force, and that if traditional protection benefits were elected, the estate "could face an obligation of up to $100 million." Revised Plan at 17. However, since that Revised Plan was filed, and prior to the Reorganization Court's issuance of Order No. 409-A, the Trustee was authorized to further restructure the MILW and to reduce his employment level so that the additional reductions in force contemplated by the Revised Plan, RLEA

submits, have now occurred. By Order No. 560, dated March 15, 1982, the Trustee was authorized to abandon his trackage west of Ortonville, Minnesota. And by Order No. 552, dated February 4, 1982, the Trustee was authorized to enter into a crew reduction agreement with the United Transportation Union. *See*, Revised Plan, § 3.7, at 26. Both of those orders have, in effect, authorized sizable reductions in forces which the record before the Reorganization Court showed were to be accomplished under the alternative employee protection program.

In short, the record before the Reorganization Court, when it was considering the remand of Order No. 409, established beyond question that the immediate termination of the deferral of traditional employee protective benefits would not harm the MILW's chances to reorganize successfully. Moreover, as shown by the stipulated testimony of Mr. Thomas B. Thompson, claimants such as Mr. Thompson are in great need of those benefits, including the medical insurance. However, Order No. 409-A does not show that the reorganization court balanced the equities in this case or gave proper consideration to "its duty to reassess continually the progress of the reorganization in light of the financial circumstances of the various [employees] . . . and to terminate the injunction [*i.e.*, deferral] at the earliest feasible date as required." *In re Penn Central Transp. Co.*, 452 F.2d 1107, 1109 (3rd Cir. 1971), *cert. denied*, 406 U.S. 944 (1972). RLEA respectfully submits that the failure of the court to make findings on this issue clearly warranted a remand of Order No. 409-A's deferral of MRRA Section 5(b)(1) benefits.

CONCLUSION

The decision below is in direct conflict with decisions of this Court holding that the exclusive jurisdiction to in-

terpret agreements between railroads and its employees is vested in arbitration boards provided for by Section 3 of the Railway Labor Act (45 U.S.C., § 153). It also conflicts with the decision of the Third Circuit cited as *In re Penn Central Transportation Company*, 452 F.2d 1107 (3rd Cir. 1971), *cert. den.*, 406 U.S. 944 (1972) as well as an earlier decision of the Seventh Circuit Court of Appeals in the *Milwaukee Appeals* cases, *supra*, with respect to the exercise of the equitable jurisdiction by the Reorganization Court to defer payments of expenses. This decision raises important questions of federal law concerning the interpretation and application of the MRRA and its relationship to other federal statutes regulating railroads and rail labor which should be reviewed by this Court. For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES L. HIGHSAW, JR.
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(202) 296-8500
Attorneys for Petitioner Railway Labor Executives' Association

Date: December 12, 1983

APPENDIX

APPENDIX A

Supreme Court of the United States

No. A-263

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, ETC., ET AL.

FURTHER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1983.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

Dated this 11th day of November, 1983.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL
and PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings for Reorganization of a Railroad

No. 77 B 8999
Thomas R. McMillen, Judge

ORDER NO. 409-A

1. The conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of Milwaukee Road employees affected by the sales authorized in Order No. 409; Section 4(e) is included therein as specified in Order No. 276B; Appendix B is also modified as follows: Page 1, line 2 shall read "sales pursuant to Section 5 . . ." and Article I, Section 1(a) shall read " 'Transaction' means any action to restructure the Milwaukee Road (Railroad) by sale . . ."

2. The Trustee is directed to establish a procedure for the filing of claims by employees for amounts due under that Appendix B;

3. The Court reserves jurisdiction to determine the priority for paying claims under Appendix B at a future date and to determine the rights of employees covered by Appendix B in the event of changed conditions in the consummation of the reorganization proceedings.

4. The conditions contained in the Labor Protection Agreement between Railroad Parties Hereto Involved in Midwest

Rail Restructuring, etc., dated March 4, 1980, are adopted for the protection of Burlington Northern and Union Pacific employees affected by the sales authorized in Order No. 409.

5. The extensive briefs and arguments submitted by the parties in interest have been considered, as have certain developments occurring in this court since June 11, 1981. Nevertheless, the principal guidance for the foregoing Order is found in *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co., Consolidated Appeals of Railway Labor Executives' Association et al.*, 658 F.2d 1149, 1166, 1167 (7th Cir. Aug. 17, 1981), *cert. den.* 50 U.S.L.W. 3716 (Mar. 9, 1982), and in the provisions of the above agreement dated March 4, 1980.

ENTER:

/s/ Thomas R. McMillen
THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

March 19, 1982

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. MCMILLEN

Cause No. 77 B 8999 Date June 18, 1982

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL
and PACIFIC RAILROAD COMPANY,

The Motion of RLEA for Reconsideration of Order No. 409-A is hereby denied on the grounds that said motion presents no new issues of law or fact for consideration by this court. The court further finds that said order is not ambiguous; it clearly excludes from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee.

ENTER:

Thomas R. McMillen
THOMAS R. MCMILLEN
Judge, U.S. District Court

APPENDIX B-2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. MCMILLEN

Cause No. 77 B 8999 Date Oct. 24, 1980

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO.,

ORDER NO. 409:

Objections to the Trustee's motion of September 10, 1980 are overruled & the Decision of the I.C.C. approving the sale of certain Milwaukee Railroad properties to the BN & UP is approved. An appropriate order will be entered this date. (Decision attached)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 B 8999

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

DECISION ON SALES TO BURLINGTON NORTHERN AND UNION PACIFIC RAILROADS

On August 21, 1980, the Interstate Commerce Commission entered a detailed Decision approving the sale of certain Milwaukee Railroad properties to the Burlington Northern, Inc. (BN) and the Union Pacific Railroad Company and Oregon-Washington Railroad and Navigation Company (collectively UP). It took no action on the competing applications of the Montana Railway Corporation and Bennett Lumber Products, Inc., although vice-chairman Gresham in his concurring opinion found that the latter two proposals are not in the public interest and should be disapproved. On September 10, 1980 the Trustee filed a motion to obtain final approval of the sales.

Several parties have filed objections to the Trustee's motion, and the BN has filed its response to these objections, supported by an affidavits of its Manager-Managerial Planning, Operations Staff. The Trustee also filed a Reply to the objections on September 26, 1980.

The agreements were negotiated pursuant to § 5(b)(1) of the Milwaukee Railroad Restructuring Act which provides that sales of operating properties to other railroads must be scruti-

nized by the Interstate Commerce Commission before this court gives final approval. The decision of the I.C.C. is subject to review by this court in accordance with the provisions of the Administrative Procedure Act, of which § 10(e) provides as follows:

> The reviewing court shall—. . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; [or]
>
> (D) without observance of procedure required by law; . . . .

We therefore have evaluated the objections in the light of the foregoing statutory restrictions, and in so doing we find that the objections lack merit.

The Mt. Vernon Terminal Railway, Inc. asserts in its objection that it is willing to bid $4,250,000 for certain segments of the railroad described in its attorney's letter to the Trustee dated September 5, 1980. The difficulties with this proposal are twofold. First, it is an issue which should have been raised when this sale was being considered by the Interstate Commerce Commission. This agency has primary jurisdiction for evaluating and adjusting questions of rail service and competition, and the Mt. Vernon had notice of the hearings. Secondly, the viability of Mt. Vernon's offer depends upon a connection with certain Canadian railroads at Sumas, Washington which cannot be made without operating rights over the BN. The BN has refused to grant such operating rights, and the I.C.C. has refused to require the BN to assign operating rights over its line. This action is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Mt. Vernon also attempts to rely upon certain antitrust positions taken by the Milwaukee Road in the Great Northern-BN "Inclusion Case" on the possibility that the pending BN and UP bids were collusive. The BN's affidavit effectively negates any such collusion. Milwaukee's petition in the Inclusion Case has been disposed of. If the Mt. Vernon Railway believes that there has been any violation of the antitrust laws, it has its remedy for damages.

The withdrawal of the Milwaukee Railroad's participation in the Inclusion Case was approved by our order entered March 19, 1980. The Milwaukee has no further interest in this merger from an operating standpoint, following its abandonment of the lines west of Miles City. The I.C.C. has itself ruled that the dismissal of the Milwaukee's objection in the Inclusion Case would not adversely affect a potential antitrust action. F.D. 21478 et al., decision June 30, 1980, p. 2. We doubt that this dismissal, with prejudice, will foreclose the Trustee's antitrust claim, since he has not released it and the statute of limitations has not run. Even if the Trustee for some reason might be precluded from making a claim for antitrust violations against the BN, neither the indenture trustees nor the other objectors assert that they also would be precluded.

Much the same can be said concerning the claim that the BN-UP negotiations were "collusive." The I.C.C. averted to the problem and referred the matter to the Department of Justice. Neither the Trustee nor any of his creditors are precluded from pursuing this in an antitrust action, although the chronology of the negotiations, as presented by the BN memorandum filed September 26, 1980 in this matter, would afford little grounds for optimism in such an undertaking. In any event, all of the antitrust objections are "intangible assets," to use the terminology of the Debtor, and their value, if any, is independent from the price negotiated for these properties.

Finally, the objections relating to possible antitrust violations do not in our opinion afford a basis for setting aside the

I.C.C. decision on either § (2)(A) or (B) of § 10e of the Administrative Procedure Act.

The State of Minnesota and the First National Bank of Chicago as indenture trustee object to that portion of the proposed sale which will close the Miles City, Montana, gateway to shipments originating or terminating in Minnesota. The Trustee's reply filed September 26, 1980 states that the gateway has been reopened for shipments originating or terminating on the Milwaukee Road in South Dakota, North Dakota and Montana, and in certain other respects, thus supporting traffic on the Milwaukee to this extent. The BN points out that an alternative gateway is available to shipments coming into or out of Minnesota. It also points out that this alternative gateway is more than adequate to handle Minnesota shipments, that it has been used for unit trains coming out of Minnesota, and that both the Chicago and Northwestern and the UP have competitive gateways in the event that the alternative BN gateway becomes too expensive. We do not find that the I.C.C. decision discussing this problem (pp. 12-16) is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

The First National Bank of Chicago as an indenture trustee, the Chicago Milwaukee Corporation and the Debtor have objected to the sales not only on the grounds that they may be arbitrary, etc. but also presumably on their usual ground that the consideration of $40,000,000 invades their constitutional rights under the Fifth Amendment. These objections therefore raise the question of valuation and whether or not the Trustee has made the best available bargain to protect the railroad's assets. With the exception of the late-blooming offer of the Mt. Vernon Railway, there is no evidence in the record that any sale of these properties could be made except to the BN and UP. There is no evidence that they are not for a fair and reasonable price, equal or in excess of the appraised value. The BN and UP were the only purchasers who were in a position to acquire these properties as a unit, the Trustee was in a weak bargaining position because he had already abandoned the

operation of these lines, and he had to make certain concessions in order to obtain the $40 million consideration and preserve as much service as possible. These objectors do not claim that the properties in question could be sold for a higher consideration if they were dismantled or sold piecemeal, and logic rejects such a conclusion. We find nothing to be gained in trying to second-guess the Trustee's bargain with these two railroads.

The remaining objections were filed by the Railway Labor Executives Association. It contends that the employees of the BN, UP and Milwaukee who are "affected" by the sale be given protection in accordance with 49 U.S.C. § 11347. Obviously the BN and UP employees are not subject to the Milwaukee Railroad Restructuring Act. If Milwaukee employees are hired for operating the acquisitions, they of course need no further labor protection. If they have been terminated because of our prior orders allowing abandonment of these lines, then the provisions for their protection are already in place. The I.C.C. dealt with this matter at pp. 24-25 of its decision. We do not find that the decision of this agency is deficient within the meaning of any of the subsections of the Administrative Procedure Act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the objections to the Trustee's motion of September 10, 1980 are overruled and the Decision of the Interstate Commerce Commission dated August 21, 1980 is approved. An appropriate order will be entered this date.

ENTER:

/s/ Thomas R. McMillen
THOMAS R. MCMILLEN
Judge, U.S. District Court

DATED: Oct. 24, 1980

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 80-2735, 82-1637

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY ("MILWAUKEE RAILROAD"),

Debtor.

APPEAL OF:

RAILWAY LABOR EXECUTIVES' ASSOCIATION.

UNITED STATES OF AMERICA,

Intervenor.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77-B-8999—Thomas R. McMillen, *Judge*.

ARGUED APRIL 21, 1983—DECIDED JULY 15, 1983

Before POSNER, NICHOLS,* and COFFEY, *Circuit Judges*.

POSNER, *Circuit Judge*. These consolidated appeals by the Railway Labor Executives' Association (RLEA) from orders of the district court, sitting as the Milwaukee Railroad Reorganization Court, require us to consider the adequacy of the labor-protection arrangements ordered by the court for two classes of employees. The first consists of 11 employees of the Chicago, Milwaukee, St. Paul, and Pacific Railroad who did not elect to receive optional benefits negotiated between the rail-

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* Hon. Philip Nichols of the Federal Circuit, sitting by designation.

road and the RLEA and embodied in an agreement signed March 4, 1980, and who are demanding that their statutory benefits be paid immediately rather than deferred till the end of the reorganization proceeding. The second group, also seeking statutory benefits, consists of employees of the Burlington Northern and Union Pacific railroads. These railroads purchased some of the Milwaukee Railroad's lines and claim that their labor-protection obligations to their own employees are limited to the obligations imposed by the March 4 agreement. As the Union Pacific is not a party to these appeals we shall ignore it and call the two groups of employees whose claims are in issue the Milwaukee group and the Burlington group.

Closely related aspects of the Milwaukee Railroad reorganization were before us two years ago in *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 658 F.2d 1149 (7th Cir. 1981), and familiarity with our previous opinion is assumed. Briefly, the Milwaukee, which by 1977 was the seventh largest railroad in the country, went broke that year and, not for the first time, sought shelter under section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205 (1952 ed.), which though since repealed remains applicable to cases filed under it. Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 403(a), 92 Stat. 2683. It soon became clear that to avoid complete collapse the railroad would have to get rid of about two-thirds of its lines. There were some potential purchasers but the sticking point was that under the Interstate Commerce Commission's rules any purchaser would have to assume potentially astronomical obligations to the workers made redundant by the purchase. In fact, in the name of "labor protection," each such worker would be entitled to six years of full pay. See 658 F.2d at 1156. With thousands of the Milwaukee's workers likely to be discharged, the total cost of protection would have been hundreds of millions of dollars, see *id.*—far more than the lines were worth to prospective purchasers. It seemed that the only way out was for the reorganization court to "embargo" (authorize cessation of operations on) the lines the Milwaukee wanted to get rid of; the hope was that an embargo would not require the ICC's authorization

and hence no labor-protection conditions would be imposed. When we held that such an embargo would be proper in the circumstances, *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 611 F.2d 662, 668-70 (7th Cir. 1979) (per curiam), not only was a major shutdown of rail transportation imminent but thousands of railroad employees could look forward to being laid off permanently with no severance pay. See H. Rep. No. 225, 96th Cong., 1st Sess. 2-3 (1979).

At this point Congress stepped in and passed the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.*, in 1979. Among other things the Act transferred primary authority over sales of the Milwaukee's lines from the ICC to the reorganization court, but provided in section 5(b)(1), 45 U.S.C. § 904(b)(1), that in authorizing any such sale "the court shall provide a fair arrangement at least as protective of the interests of the employees as that required under" 49 U.S.C. § 11347. If Congress had stopped there, however, it would not have achieved its purpose of averting the Milwaukee's collapse, for it is under the aegis of 49 U.S.C. § 11347 and its predecessor provisions that the ICC has devised the incredibly expensive labor-protection arrangements that the Milwaukee Railroad could not afford to pay. See *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Congress therefore went on to require, in section 9 of the Milwaukee Act, 45 U.S.C. § 908, that the unions and the Milwaukee negotiate a labor-protection arrangement the benefits under which would be treated as administrative expenses of the bankrupt estate (section 9(d)). Under principles of equity receivership, which govern railroad reorganizations, see 11 U.S.C. § 205(b) (1952 ed.); *In re Chicago & N.W. R. Co.*, 110 F.2d 425, 430 (7th Cir. 1940), such benefits would be entitled to highest priority, cf. 3 Collier on Bankruptcy § 507.04[1] (15th ed. 1983), and hence as a practical matter would be payable immediately. Section 13 of the Milwaukee Act, 45 U.S.C. § 912, required each employee to choose between receiving benefits under the section 9 agreement and receiving statutory (that is, section 5(b)(1)) benefits.

A section 9 agreement was negotiated—the agreement of March 4, 1980—and it provided for severance pay equal to 80 percent of a worker's pay for three years. Faced with a choice between this bird in the hand and more than two birds (100 percent for six years) in a very remote bush, almost all of the Milwaukee's employees chose the section 9 benefits, thus waiving, by virtue of section 13, any right to section 5(b)(1) benefits. A handful of employees did not elect to receive such benefits; they are the Milwaukee group, whose claim to immediate payment of section 5(b)(1) benefits we turn to first.

Although the Milwaukee Act nowhere states that statutory benefits shall be deferred, it is not easy to make sense out of the Act without assuming that Congress wanted deferral. Since the statutory benefits are not only more generous than the contractual benefits but impossibly more generous, the only way of persuading the employees to waive them—hence the only way of preventing the shutdown of the railroad that it was the statute's main object to avert—was to give them their substitute contractual benefits immediately. Section 9(d) did this, in effect, by making those benefits administrative expenses of the bankrupt estate. But all this might have been futile if statutory benefits had also been payable immediately; for then each employee would have had an incentive to hold out for the statutory benefits in the hope that enough other employees would choose the contractual substitute to make his statutory benefits affordable, and such attempts to beggar-thy-neighbor could have put the Milwaukee right back where it had been before the statute was passed. Thus the structure of the statute, though no specific language, seems to require the deferral of statutory benefits. Compare *Railway Labor Executives' Ass'n* v. *Southeastern Pennsylvania Transport. Auth.*, 534 F. Supp. 832, 847-48 (Spec. Ct. R.R.R.A. 1982) (Friendly, J.). We so held the last time this case was here. See 658 F.2d at 1158-60.

But since then, the Supreme Court has decided *Railway Labor Executives' Ass'n* v. *Gibbons*, 102 S. Ct. 1169 (1982), and we are asked to reexamine our earlier decision in light of it.

Gibbons held the labor-protection provisions of another special railroad reorganization statute, the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005, 1008, invalid under the bankruptcy clause of Article I, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The Rock Island Act was passed after the Rock Island reorganization court authorized a total shutdown of the railroad and ruled that no labor-protection benefits had to be paid. The Act provided for such benefits; and the provisions that were invalidated in *Gibbons* required treating the benefits as an administrative expense. Since the provisions "cover[ed] neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad," the Court held "that such bankruptcy law is not within the power of Congress to enact. A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." 102 S. Ct. at 1177.

Although the invalidated provisions of the Rock Island Act resemble section 9 of the Milwaukee Act, which authorizes one class of the creditors of one bankrupt railroad to have their contractually negotiated severance pay treated as an administrative expense, we need not decide how close the resemblance is. Section 9 is not under attack here. The RLEA is not arguing, and given its representative function hardly could argue, that the thousands of Milwaukee Railroad employees who chose to receive immediate benefits under section 9 obtained an unconstitutional preference. Its quarrel is with section 5(b)(1) of the Act, as interpreted in our previous decision to require the Milwaukee's trustee to defer payment of statutory benefits to the employees who did not choose section 9 benefits.

Perhaps concerned with the potential constitutional problem, Congress in section 17(b)(1) of the Milwaukee Act extended the labor-protection requirements of section 5(b)(1) to all other railroad bankruptcies pending when the Act was

passed. The relevant language of the two sections is identical. If section 5(b)(1) requires deferral of statutory benefits for the Milwaukee's employees because the Act authorizes them to receive immediate benefits under section 9, then section 17(b)(1) presumably requires the same kind of deferral in any railroad bankruptcy where the employees of the bankrupt line have a right to choose immediate receipt of substitute benefits. The rub is that other bankruptcy laws do not have counterparts to section 9. Whether directly challenged in these appeals or not, section 9 is hard to ignore in determining the effect of section 5(b)(1) on the rights of creditors. Applied to a reorganization under another bankruptcy law that had no counterpart to section 9, section 17(b)(1) might not require any postponement of statutory benefits, in which event the Milwaukee Act would seem to have a nonuniform effect after all.

Fortunately, however, we need not decide whether this indirect effect would be enough to invalidate the Act as interpreted in our previous opinion to require postponement of statutory benefits. First, having taken advantage of section 9 of the Milwaukee Act to the extent of obtaining many millions of dollars in labor-protection benefits for the workers that it represents—money it does not propose be repaid if it wins this appeal—the RLEA may not turn around and challenge the constitutionality of the statutory scheme of which section 9 is an integral part. Section 5(b)(1), the nominal target of the challenge, is, in combination with section 17(b)(1), a uniform bankruptcy law. It becomes vulnerable only when read together with section 9. Having exploited section 9 for its own purposes in this reorganization proceeding, the RLEA will not be heard to challenge its constitutionality, whether directly or indirectly, in the same proceeding.

Second, the objection in *Gibbons* was to accelerating payment to a class of creditors; here it is to delaying payment to a similar class of creditors. The difference is important. A reorganization court has unquestioned power to defer the payment even of high-priority claims against the bankrupt estate, as we pointed out the last time this case was here, see 658 F.2d at

1164-66, citing *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648 (1935). We may assume without having to decide that the reorganization court could not in the absence of the Milwaukee Act force the Interstate Commerce Commission to authorize, without requiring immediate payment of the customary labor-protection benefits, the purchase of a bankrupt railroad's lines; and we know the Commission has been reluctant to allow postponement of such benefits. See *Central R. Co. of New Jersey—Abandonment*, 342 I.C.C. 227, 300 (1972); *Penn Central Transport Co. Reorganization*, 347 I.C.C. 45, 91-92 (1973). But the Commission has no blanket rule that such benefits may never be postponed and we think it well-nigh inevitable that, irrespective of any compulsion the Milwaukee Act might have laid on it, the reorganization court, with the Commission's consent, would have used its equitable powers to defer the payment of benefits to the Milwaukee group. The equities of prompt payment were weak. The members of the group were no longer employees; and they could not have had an urgent need of immediate payment, or else, like most of their brethren, they would have elected to receive immediately the generous benefits provided by the arrangement that their representative had negotiated with the railroad under section 9.

It is no answer that the railroad could have "afforded" to pay statutory benefits to 11 employees at the same time as, or shortly after, it paid section 9 benefits to thousands of other employees. There would not have been 11—there would have been hundreds or thousands—of hold-outs if statutory benefits had been expected to be paid as soon or nearly as soon as section 9 benefits; and with enough hold-outs, the railroad would have shut down and the reorganization would have failed. Postponing payment of statutory benefits was merely honoring the reorganization court's implicit commitment to create a sequence of payments that would scale down labor-protection benefits to a realistic level. See also 658 F.2d at 1166.

If we were certain that because of these equitable considerations the Milwaukee group would not be paid any earlier even if the Milwaukee Act did not require deferral of statutory benefits, we would conclude that the group lacked standing to question the constitutionality of deferral. We are not so certain as to be able to place decision on that ground, but our analysis suggests an alternative interpretation of the Act that eliminates any problem created by *Gibbons*. Earlier we said the Act had to be read to require deferral, as otherwise its objective of preventing the Milwaukee from being destroyed by labor-protection obligations would have been thwarted. But this assumes that workers electing statutory benefits could be confident of having them paid promptly unless the statute required that payment be deferred, and they could not be confident; in fact, they could only be confident of the opposite—that the reorganization court would exercise its equitable powers to defer payment. Since a statutory provision requiring deferral was thus not necessary to induce most employees to elect section 9 benefits, the absence of such a provision may not, as we suggested earlier, have been a congressional oversight. And if the statute need not be read to require deferral of statutory benefits but can be read merely to have assumed without requiring that the reorganization court would use its preexisting equitable powers to defer such benefits, the statute itself creates no lack of uniformity in the bankruptcy laws.

The district court held that the March 4, 1980, agreement barred the members of the second group of employees in this case, the Burlington group, from receiving any benefits under the Milwaukee Act. The RLEA argues variously that the district judge had no jurisdiction to construe the agreement, that he misconstrued it, and that regardless of what the agreement provides these employees are entitled to statutory benefits.

The jurisdictional argument is as follows: The March 4 agreement was an agreement between management and labor over conditions of employment in the railroad industry and therefore a collective bargaining agreement within the mean-

ing of the Railway Labor Act, 45 U.S.C.§§ 151 *et seq.*; that Act has been interpreted to give the arbitration tribunals set up under it exclusive jurisdiction to interpret such agreements, see, e.g., *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322-24 (1972) (with an exception for so-called "major disputes" that is irrelevant to this case); therefore the district court had no power to interpret the agreement and ought to have stayed its proceedings while the parties submitted their dispute to arbitration.

There is authority for classifying a labor-protection arrangement that is incidental to a transaction regulated by the Interstate Commerce Commission as a collective bargaining agreement under the Railway Labor Act. See, e.g., *O'Mara* v. *Erie Lackawanna R.R.*, 407 F.2d 674, 677-78 (2d Cir. 1969), aff'd on other grounds *sub nom. Czosek* v. *O'Mara*, 397 U.S. 25 (1970). But the March 4 agreement states that it is based on the Milwaukee Act as well as on the Railway Labor Act; the agreement was expressly authorized by section 9 of the Milwaukee Act, even though that section refers only to employees of the Milwaukee; and it is therefore a mixture of a section 9 agreement and a Railway Labor Act agreement. We must decide whether Congress, in enacting section 9 without making any reference to the Railway Labor Act, wanted any dispute over a section 9 (or a mixed section 9-Railway Labor Act) agreement to be decided by arbitration, subject to the extremely narrow judicial review of railroad arbitration awards provided in 45 U.S.C. § 153 First (p). See, e.g., *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93-94 (1978) (per curiam).

That seems unlikely. Cf. *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), and cases discussed there. Section 5(b)(1) of the Milwaukee Act required the district court to impose labor-protection conditions before approving the sale of any of the Milwaukee's lines to the Burlington. The Burlington argued to the court that the March 4 agreement barred protective conditions for any of its own employees not taken care of in that agreement. To determine the merit of this argument the dis-

trict court had first to determine whether the parties to the agreement intended it to be exclusive. Although the court may have had the power to refer this preliminary question to one of the arbitration boards set up under the Railway Labor Act (a question we need not decide), to have done so would have delayed the reorganization, thus thwarting a major purpose of the Milwaukee Act—to enable the reorganization court to dispose speedily of the Milwaukee's surplus lines and thereby prevent the complete shutdown of the railroad. The Milwaukee Act does provide for reference to the Interstate Commerce Commission, see section 5(b)(2), but under stringent time limits. Yet the RLEA contends there is a duty that is without limit of time to refer any dispute over the meaning of a section 9 agreement to arbitration, so that even though the RLEA did not request such a reference until after it had asked the district court to interpret the agreement and had been disappointed by the court's interpretation, it had an absolute right, founded on the district court's lack of jurisdiction, to the reference. But it is unlikely that Congress would have wanted to allow these reorganization proceedings to be strung out this way, cf. *International Ass'n of Machinists & Aerospace Workers* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir. 1972), or that, having displaced much of the ICC's traditional authority over a bankrupt railroad, Congress was concerned with preserving undiminished the authority of the arbitration tribunals created under the Railway Labor Act.

Moreover, the main reason for giving arbitrators exclusive jurisdiction to interpret rail labor agreements—that they are better at the task than courts—has little realism under a statute that designates a particular district court as the court for the reorganization of a particular railroad. The district judge assigned to sit as that court will learn as much about the labor relations of the railroad as any arbitrator. True, there is some role for arbitration under the Milwaukee Act: employees claiming benefits under section 9 are required by section 9(c)(2) to file their claims with the National Mediation Board, which is one of the arbitral bodies set up by the Railway Labor Act; and

presumably the Board would, as an adjunct to its claim-paying function, resolve any disputes over the coverage of the Act. But the employees in the Burlington group are not claiming under the March 4 agreement or any other section 9 agreement (and could not, because section 9 is limited to employees of the Milwaukee) but under section 5(b)(1) itself.

This is another reason why the Burlington group's jurisdictional argument must fail. By claiming that only an arbitrator can determine whether the agreement is a bar to obtaining statutory benefits, the group is not invoking the exclusive jurisdiction doctrine of the *Andrews* line of cases, which confine to the arbitration panels set up under the Railway Labor Act all claims that are within the scope of a railroad collective bargaining agreement but not claims, like these employees' claims, that are not based on the agreement and that the employees contend are not even affected by it. The Burlington group is invoking the distinct doctrine of primary jurisdiction, which comes into play when in the course of a lawsuit properly brought in court an issue arises that is within the competence of some administrative agency to decide, and the suit is stayed while the parties go ask the agency to resolve the issue. See, e.g., *City of Peoria* v. *General Elec. Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982).

The doctrine of primary jurisdiction has been used, in fact though not in name, to require a reorganization court to refer a question of interpretation of a collective bargaining contract to an arbitral tribunal set up under the Railway Labor Act. See *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 566-67 (1946); cf. *Air Line Pilots Ass'n* v. *Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980). And Congress' desire that such a tribunal rather than a court decide an issue might be so strong that the court would be required to refer the issue on its own initiative even if neither party had requested a reference in timely fashion. But even if Congress in enacting the Milwaukee Act had wanted the reorganization court to refer any issue involving interpretation of a collective bargaining agreement to the tribunals set up under the Railway Labor Act—a doubt-

ful proposition as we have seen—we are quite sure it would not have wanted to prevent the parties to the reorganization proceeding from waiving reference. Otherwise, since there is no statutory deadline on reference (indeed, no statutory mention of reference), reorganization could be indefinitely delayed by a tardy demand for reference. We conclude that a failure to make a prompt request for reference is a waiver of any claim that an issue is within the arbitration tribunals' primary jurisdiction. That claim was waived here by the RLEA's failure to raise the issue till after it had twice requested the reorganization court to construe the contract. The delay was inexcusable, especially given the importance of expediting the reorganization proceeding.

Having concluded that we have jurisdiction to interpret the March 4 agreement, we must next determine whether the agreement was intended to bar a claim to statutory benefits by any Burlington employee not entitled to benefits under the agreement. The agreement itself is ambiguous. On the one hand it is labeled an agreement "between railroads parties hereto involved in midwest rail restructuring and employees of such railroads," and thus would seem to have an intended scope going beyond the Milwaukee's own employees. And it not only makes provision for other railroads' employees, including employees of the Burlington, which was one of the parties to the agreement, but implies in one passage that that provision is exclusive: "A purchasing carrier [such as Burlington] will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs." On the other hand the preamble of the agreement states that its "scope and purpose . . . are to provide . . . a fair equitable and complete arrangement for protection of Milwaukee . . . workers," and later the agreement states that its provisions "shall constitute

the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ because of a transaction." The employees in the Burlington group are not employees of the Milwaukee, the bankrupt carrier.

In an attempt to disambiguate the agreement, the Burlington begins, umpromisingly, with two arguments that are inconsistent—though of course one could be right. The first is that the RLEA has made no showing that any employee not covered by the agreement has been hurt by the Burlington's purchase of lines from the Milwaukee. The basis of this argument is that the Burlington group consists of employees who do not work in the immediate geographical areas of the acquired lines. The Burlington's second argument is that it would never have signed the agreement had it been exposed to potential crushing liability for statutory benefits to employees not covered by it. But if no one is hurt, why would liability—a purely theoretical liability, having no practical consequences—have deterred the Burlington from signing the agreement? In any event, labor-protection arrangements are supposed to be in place before consummation of the purchase, to take care of workers who may be hurt by it. Because the district court had and exercised authority to allow the Burlington to become an interim operator of the Milwaukee lines that it wanted to purchase, there has been some experience with the actual effects of the transfer on Burlington workers in areas remote from the acquired lines, but not enough to be able to say that no such worker could possibly be hurt by the transfer. The March 4 agreement contemplates a merging of seniority districts of the Burlington and Milwaukee in the areas where the acquired lines are located. As a result of this merger some Burlington workers may become redundant and be laid off, and their collective bargaining agreement with the Burlington may entitle them to relocate elsewhere in the Burlington system, thus bouncing workers there who have less seniority. It is those bounced workers who could be hurt by the transaction yet who would have no protection under the March 4 agreement. It is too soon to tell whether there will be any such workers.

The Burlington's second argument is more persuasive. If the March 4 agreement was not intended to be exclusive, it would not have solved the great obstacle that the Burlington saw to purchasing lines from the Milwaukee; having to assume vast liabilities for severance pay. Since most of the workers made redundant by the purchase would be in areas where the lines to be purchased were located, a failure to provide for all possible labor-protection claims would not expose the railroads to catastrophic liability. But you do not need mass lay-offs to make labor protection expensive for a railroad. With statutory benefits set at 100 percent of a worker's wage for six years, one severance can easily cost the railroad $100,000 or more. Since hundreds of Burlington workers are potentially affected by the transaction besides those in the immediate neighborhood of the acquired lines, there is potential liability in the tens of millions of dollars if the March 4 agreement is found to have the gap that the RLEA claims it does. It is unlikely that the parties agreed to such a gap. True, in *St. Louis-Southwestern Ry.-Purchase*, 363 I.C.C. 320, 380 (1980), the Commission interpreted the March 4 agreement (which applies to acquisitions of Rock Island as well as Milwaukee lines) as not barring out-of-district workers of the Southern Pacific from getting statutory benefits. But, according to the record of that case, Southern Pacific had agreed to protect these workers before the March 4 agreement was signed, and the agreement expressly entitles workers covered by it to choose between it and any preexisting protective arrangement in their favor.

It is also relevant to note that the benefits agreed upon in the March 4 agreement are less than half as large as the statutory benefits. The only thing that made them attractive to the Milwaukee's employees was that they were to be paid immediately, not deferred till the end of the reorganization proceeding. But the deferral feature would not apply to employees of the Burlington, a solvent carrier that would have to pay any labor-protection benefits as soon as they become due, that is, as soon as a worker entitled to them was laid off. This means, though, that under the RLEA's view of the agreement,

adversely affected Burlington employees in areas remote from the acquired lines are to receive twice as much money at roughly the same time as Burlington employees in the area of the acquired lines, who are covered by the March 4 agreement. No reason for such a perverse disparity in treatment has been suggested and we doubt the parties intended the agreement to create it.

The remaining question is whether, even if the March 4 agreement was intended to extinguish any claims to statutory benefits by these employees, the employees can claim those benefits anyway, since section 5(b)(1) requires the Commission to make a fair arrangement that will give the workers at least the benefits they would have under 45 U.S.C. § 11347. They cannot get to first base with this argument unless they are employees within the meaning of the Milwaukee Act, which defines "employees" to include any employees of the Milwaukee Railroad "who worked on a line of such railroad the sale of which became effective on October 1, 1979," but to exclude certain executive officers. 45 U.S.C. § 902(4). Although this definition may not be comprehensive, every specific reference in the Act to "employee" is to an employee of the Milwaukee or occasionally of some other bankrupt railroad; section 9, for example, is explicitly limited to agreements with employees of the Milwaukee. Still, it has long been the practice in railroad acquisitions to impose protective conditions for the benefit of workers of the purchasing as well as of the purchased line, and given the solicitude for labor that suffuses the Act it is implausible that Congress meant to deny the workers of the acquiring railroads any statutory protection.

So the question is whether the March 4 agreement as interpreted to exclude these Burlington workers from any protection from adverse consequences of the acquisition can still be deemed a "fair arrangement" at least as protective of the interests of the employees as is required by 49 U.S.C. § 11347. That section, after also defining minimum labor-protection conditions in terms of a "fair arrangement," states: "Notwithstanding this subtitle, the arrangement may be made

by the rail carrier and the authorized representative of its employees." This implies at least some deference to voluntarily negotiated labor-management agreements such as the March 4 agreement. And what is "fair" under section 5(b)(1) must have some reference to the background and purposes of the Milwaukee Act. The overriding purpose was to avert a complete shutdown of the railroad by providing affected workers with immediate payments in substitution for the overly generous statutory benefits to which they would otherwise have been entitled but which might actually have been completely worthless to them because, if claimed, they would have plunged the railroad into the abyss. See 658 F.2d at 1156 n.9. Although the main concern was with benefits for the Milwaukee's own employees, it would have been difficult to get the purchasing railroads to agree to purchase the Milwaukee's surplus lines if they could not have bought off all labor-protection claims at once—not only the Milwaukee's workers' claims but their own workers' claims. An arrangement that accomplishes this is "fair" even though some workers, rather remotely connected to the transaction, get no protection.

This conclusion is not inconsistent with *Norfolk & Western Ry.* v. *Nemitz*, 404 U.S. 37 (1971), where the Supreme Court, interpreting a materially identical predecessor of section 11347, held that a labor-protection agreement incidental to a merger did not override the workers' statutory entitlements. The railroad in that case relied on the sentence in what is now section 11347 that authorizes voluntary agreements. The Commission had read this sentence to allow it to delegate the making of adequate protective arrangements to parties negotiating such an agreement. The Court refused to allow the Commission to do this, no doubt fearing lest the labor representatives might not protect the interest of all the workers though obligated to do so by the Railway Labor Act as interpreted in such cases as *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 199 (1944). But in this case there was no automatic deference to the parties. The March 4 agreement was reviewed and approved by both the ICC and the district

court as a fair arrangement. And the crisis that brought on the agreement in this case had no parallel in *Nemitz* and makes this agreement a reasonable one in the circumstance even though it entailed the potential sacrifice of the interests of a small number of the purchasing railroads' workers to the interests of the thousands of Milwaukee employees whose jobs were in imminent jeopardy of disappearing with no severance pay at all. The fact that the sacrifice was only potential further distinguishes *Nemitz*: it is uncertain that workers so tenuously related to the transaction have to be given *any* protection for the arrangement to be fair under section 11347. See *Clemens* v. *Central R.R. of New Jersey*, 264 F. Supp. 551, 565-68 (E.D. Pa. 1967), rev'd on other grounds, 399 F.2d 825 (3d Cir. 1968); *Laturner* v. *Burlington Northern, Inc.*, 501 F.2d 593, 608 n. 37 (9th Cir. 1974) (dictum); cf. *American Train Dispatchers Ass'n* v. *ICC*, 578 F.2d 412 (D.C. Cir. 1978).

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. **Section 5 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904**

2. **Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347**

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1. Section 5 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904

Court Approved Abandonment And Sales

Sec. 5(a)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, 1980, whichever first occurs, the bankruptcy court may authorize the abandonment of lines of the Milwaukee Railroad pursuant to section 1170 of title 11 of the United States Code. Pending the expiration of the time for appeal of an abandonment order or the determination of any such appeal, the bankruptcy court may authorize the termination of service on a line to be abandoned, and the order authorizing such termination may not be stayed. In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(2) Prior to the date specified in paragraph (1) of this subsection, the bankruptcy court may hear and consider any request for the abandonment of lines of the Milwaukee Railroad, and may fix the time for the Commission's report on the request, but it may take final action authorizing such abandonment only in accordance with such paragraph (1).

(b)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, whichever first occurs, the bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations,

subject to the approval of the Commission under paragraph (2) of this subsection. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(2) The bankruptcy court may not authorize a sale or transfer pursuant to paragraph (1) of this subsection unless an appropriate application with respect to such sale or transfer is initiated with the Commission and, within such time as the court may fix, not exceeding 180 days, the Commission, with or without a hearing, as the Commission may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Commission approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(b), 706(2)(C), and 706(2)(d) of title 5 of the United States Code. An application may be initiated with the Commission prior to the date specified in paragraph (1) of this subsection.

(3) Pending review of an application by the Commission pursuant to paragraph (2) of this subsection, the bankruptcy court may, on a preliminary basis, authorize the sale or transfer of lines of the Milwaukee Railroad to another rail carrier. The court may permit the purchasing carrier to operate interim service as a common carrier over the lines to be purchased, without regard to section 10901 of title 49 of the United States Code. In operating such service, the purchasing carrier shall use employees of the Milwaukee Railroad to the extent necessary for the operation of such service. The bankruptcy court may take final action authorizing any such sale or transfer only in accordance with paragraph (1) of this subsection.

(c) Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this act.

2. Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347

Sec. 11347. Employee Protection Arrangements In Transactions Involving Rail Carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

APPENDIX E

LABOR PROTECTIVE AGREEMENT
between
RAILROADS PARTIES HERETO
INVOLVED IN MIDWEST RAIL
RESTRUCTURING
and
EMPLOYEES OF SUCH RAILROADS
REPRESENTED BY THE RAIL
LABOR ORGANIZATIONS
operating through the
RAILWAY LABOR EXECUTIVES' ASSOCIATION

The scope and purpose of this agreement are to provide, pursuant to the Milwaukee Railroad Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.), a fair, equitable and complete arrangement for protection of Milwaukee and Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner, as set forth herein, immediately upon authorization for such operation.

Article I. General Provisions

1. *Definitions*—Whenever used in this agreement, unless its context requires otherwise:

(a) "Purchasing carrier" means a signatory party to this agreement who is either the interim service operator (pursuant to Commission or Court Order) or the eventual purchaser of a line of railroad of the Rock Island or the Milwaukee, or who is a remaining operating carrier under an existing joint trackage agreement with the Rock Island or Milwaukee.

(b) "Rock Island" means the Chicago, Rock Island and Pacific Railroad Company.

(c) "Milwaukee" means the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

(d) "Bankrupt carrier employee" means any person with an employment relationship (i.e., in active service or on furlough) with the Rock Island, or with the Milwaukee as of the date of this agreement.

(e) "Transaction" means restructuring of the Rock Island and/or the Milwaukee by sales or transfers of railroad lines to a purchasing carrier, or interim operator.

2. *Labor Protection Obligations*—

(a) The provisions of this agreement shall constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ because of a transaction. A purchasing carrier will have no labor protection obligation to any other bankrupt carrier employees.

(b) The labor protection obligation, if any, for employees of the Rock Island who are not taken into the employ of a purchasing carrier because of a transaction, and for moving expenses of those employees of the Rock Island who are taken into the employ of a purchasing carrier because of a transaction, will not be the responsibility of the purchasing carrier.

3. *Notice and Negotiation*—A purchasing carrier will notify interested employee representatives, including those on the Rock Island or Milwaukee, of each transaction as soon as it has been authorized to become an interim service operator or finalizes arrangements to be a purchaser. Thereafter, except as specifically provided in Article II the purchasing carrier shall be relieved of any requirement to notify its employees or to reach implementing agreements concerning that transaction.

Article II. Hiring and Work Rules

1. *Eligibility for Hiring*—All employees of the Rock Island or Milwaukee who held seniority on the effective date of this agreement in a craft represented by one of the labor organizations signatory hereto shall be eligible for participation in the hiring procedures described in this Article.

2. *Determination of Need for Additional Employees*—A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over those Rock Island and Milwaukee Lines. Each of the determinations shall be discussed with representatives of the crafts on purchasing carrier and on the Rock Island or Milwaukee with detailed explanation to them of the basis for each determination prior to serving notice under paragraph 4 hereof, but there shall be no delay in hiring employees or in commencement of operations. If a purchasing carrier has employees on furlough they will not be subject to recall as a result of the additional manpower requirements resulting from a transaction, until after bankrupt carrier employees on appropriate seniority rosters have exhausted their opportunity to be hired hereunder.

3. *Preferential Hiring*—As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island or Milwaukee the first right of hire respectively, dependent on whose trackage is involved, and consistent with the purpose of Section 8 of the Milwaukee Railroad Restructuring Act. Each carrier, whether acquiring lines or operating lines on an interim basis, shall independently make such determination of its needs for additional employees irrespective of any determination of this nature made by other carriers. In carrying out the purposes of this section, the purchasing carriers shall first utilize existing seniority rosters applicable to the appropriate craft and seniority district for the lines and territories involved in fulfilling employment needs in connection therewith.

4. *Notification of Hiring*—When a carrier determines that it needs additional employees under this Article, such carrier shall notify the labor organizations representing employees of the Rock Island or Milwaukee of its specific needs and advise them exactly where and how eligible employees of the craft needed from the Rock Island or Milwaukee should apply for such vacancies. Eligible employees of the Rock Island or Milwaukee interested in such vacancies shall have the responsibil-

ity of applying to the carrier for vacancies in the manner described by the carrier. An employee shall have 7 days to apply after receipt of notice from the carrier or the organization or 20 days after the labor organization has received notice from the carrier, whichever occurs first, subject to paragraph 9 hereof. To the extent that the carrier has determined a need for additional employees under this Article, applicants will be required to meet those physical and rules standards which the carrier applies to its own employees on reexamination. The applicant's seniority in the appropriate craft and seniority district on the bankrupt carrier will prevail if the number of qualified applicants exceeds the carrier's determined need for additional employees. Bankrupt carrier employees who are in service with a bankrupt carrier at the time of interim operation or purchase and who are hired on the commencement of operations by a purchasing carrier pursuant to this agreement will be presumed qualified physically and purchasing carrier will have the burden of proof if it wishes to challenge such qualifications.

Those employees who are subject to examination on purchasing carrier's operating book of rules may be required to pass a re-examination on those rules.

5. *Duration of Preferential Hiring*—The procedures established in this Article shall continue in full force and effect for not less than one year from the effective date from the commencement of operations or as otherwise provided for by law, but in no event beyond April 1, 1984.

6. *Employee Election*—An eligible employee of the Rock Island or Milwaukee afforded the first right of hire pursuant to this Article by more than one carrier signatory hereto shall have the option to elect on which carrier the employee will exercise such right. Should a transaction involving another purchasing carrier occur subsequent to the employee's initial election which the employee finds is preferable, the employee will have one opportunity to be hired by another purchasing carrier.

7. *Termination of Seniority*—When final agreement has been reached pursuant to Paragraph 9 of this Article dealing with seniority, those Rock Island and Milwaukee employees who are hired by a purchasing carrier will be considered as having severed their employment relationship with their former employer.

8. *Application of Work Rules*—

(a) A purchasing carrier shall not take over or assume any of the contracts, schedules or agreements in effect between the Rock Island or Milwaukee and its employees concerning rates of pay, rules, working conditions or fringe benefits, and shall not be bound by the terms and provisions thereof.

(b) An employee of the Rock Island or Milwaukee hired by a purchasing carrier shall come under the coverage of all contracts, schedules and agreements in effect between such carrier and its employees concerning rates of pay, rules, working conditions and fringe benefits, and shall be bound by the terms and provisions thereof in the same manner and to the same extent as other employees of the purchasing carrier working in the same craft.

(c) The purchasing carrier shall have the option:

(1) to commingle, under the purchasing carrier's work rules, work in connection with lines acquired from the Rock Island and/or the Milwaukee with work in its existing seniority districts, including expansion of those seniority districts to encompass the acquired lines; and where there are agreed-upon switching limits for yards at a common point, switching limits of the purchasing carrier will be extended to include the switching limits of the acquired property; or

(2) to operate the acquired property as a separate seniority district or districts under the purchasing carrier's work rules.

9. *Implementing Agreement—*

(a) In accordance with the option selected under paragraph 8 of this Article, agreements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier. In the absence of an agreement, in order to avoid delay in operations, the purchasing carrier may, on a temporary basis, hire qualified and available bankrupt carrier employees to the extent needed where additional jobs are established at the outset. Such employees will be placed at the bottom of the current list of active employees, and they will remain in such status until an agreement is reached respecting seniority in accordance with the provisions of this paragraph. Where no additional jobs are established, the purchasing carrier's present employees' jobs may be expanded to include work on or in connection with the acquired property. If, as a result of the agreement on allocation of seniority, bankrupt carrier employees used on such a temporary basis do not secure jobs with the purchasing carrier, their employment with the purchasing carrier will be terminated without any preservation of rights or benefits with the purchasing carrier.

(b) If an agreement is not reached within ten (10) days from the date of the notification given under Article I, paragraph 3 hereof, either party to the dispute may utilize the following procedures for determining the allocation of seniority referred to above:

(1) Within five (5) days after notice in writing from one party to another that it desires to arbitrate the dispute, the parties shall select a neutral referee and in the event they are unable to agree upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne in accordance with the Railway Labor Act.

Notwithstanding any of the foregoing provisions of this section, the purchasing carrier may proceed with the transaction, provided that all hired bankrupt carrier employees shall be provided with all of the rights and benefits of this agreement.

(c) An employee hired by a purchasing carrier in one craft but who also has seniority in another craft with Rock Island or Milwaukee, such as a yardmaster who also has seniority as a yardman, will be given seniority in both crafts on the purchasing carrier. This issue will be handled in the negotiations under paragraph (a) hereof.

(d) The issue of seniority date and service date where an employee transferred from one roster or craft to another on the bankrupt carrier will be handled in the negotiations under paragraph (a) hereof.

(e) Special projects—Protection, seniority and contracting (pursuant to existing agreements) in special rehabilitation projects will be subject to negotiations between individual purchasing carriers and interested employee representatives.

Article III. Monthly Compensation Guarantee

1. *Coverage*—A purchasing carrier will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs.

2. *Duration*—Each employee described in paragraph 1 of this Article shall be entitled to receive a monthly compensation

guarantee payment for a total of not more than 36 months from the date employee makes a claim for it, except that:

(a) the period of entitlement to a guarantee payment shall not exceed the employee's total months of service prior to date interim operation is begun or purchase completed, whichever first occurs, with the bankrupt or the purchasing carrier, as the case may be; and

(b) payments of this type received from a bankrupt carrier, or any interim service operator, or a purchasing carrier or under supplementary unemployment insurance (such as Section 10 of Milwaukee Railroad Restructuring Act) all count toward the limit on the total number of months as set forth above; and

(c) no compensation shall be provided under this section after April 1, 1984, unless it is necessary in order to provide an employee with at least eight (8) months of the payments, but after such date, that employee shall receive the eight-month minimum only if that employee is not employed continuously after that date.

3. *Guarantee*—the monthly compensation guarantee shall be an amount equal to:

(a) 80 percent of an employee's average monthly straight-time compensation (including all general wage increases negotiated nationally for railroad employees) earned from the Milwaukee (or purchasing carrier) during the period beginning June 1, 1977 and ending October 31, 1979, or from the Rock Island (or purchasing carrier) during the period June 1, 1977 and ending on May 31, 1979.

(b) In the case of an employee who served as an agent or a representative of a class or craft of employees on either a full- or part-time basis during the period set forth in subsection (a) above, 80 percent of the average monthly straight-time compensation (including all general wage increases negotiated nationally for railroad employees) of the employees actively employed in his class or craft involved immediately above and below him on the same seniority roster or 80 percent of his own average monthly straight-time compensation as computed in subsection (a) above, whichever is greater. This subsection (b) shall also be applicable to railroad officials, supervisory or fully exempt personnel who return to their respective crafts.

4. *Payments and Offsets—*

(a) Each employee described in paragraph 1 of this Article shall be eligible to receive a monthly compensation guarantee payment for any month in which such employee's monthly compensation guarantee exceeds such employee's actual compensation for that month with an offset for any losses due to absences from service or account of injury, sickness, disability, or discipline for cause in accordance with existing agreements. In computing such offset the guarantee will be reduced proportionately on the basis of working days in the month. Claims for guarantee shall be paid within 30 days after date claim is filed, except in the case of the initial claim it will be paid within 90 days of filing.

(b) Notwithstanding other provisions of this agreement, the carrier may reduce the "monthly compensation guarantee" for each day lost under emergency conditions such as flood, snowstorm, tornado, cyclone, hurricane, earthquake, fire or strike, provided that operations are suspended in whole or in part and provided further that because of such emergencies the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved cannot be performed. The reduction in monthly compensation guarantee will be reduced proportionately on basis of working days in the month.

(c) The sum of (A) the amount of any benefits payable to such employee for such month under the Railroad Unemployment Insurance Act or under any state unemployment insurance program, and (B) the amount of any earnings of such employee for such month from employment or self-employment which is first engaged in after the employee is adversely affected, may be used as an offset.

(d) The monthly compensation guarantee payment shall cease prior to the expiration of the period as set forth in paragraph 2 of this Article in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to exercise seniority on an

available position less than 125 railroad route miles from his or her residence, and for failure without good cause to accept a reasonably comparable position which does not require a change of residence, for which he is physically and mentally qualified, if his return does not infringe upon employment rights of other employees under a working agreement. "A change of residence" as used herein means a transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and further from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also further from his residence than was his former work location.

(e) If, for any reason, an interim service operator is denied Commission approval or court authorization for final sale or transfer of a line of a bankrupt carrier, or ceases to be an interim operator, or if a successor carrier agrees, or is ordered to, perform the functions formerly performed by the Rock Island or Milwaukee under an existing joint trackage agreement, the employment of bankrupt carrier employees who may be employed to fill the positions necessary for the operation of such service on such line may be terminated simultaneously with the cessation of that service, without preservation of rights or benefits with that purchasing carrier.

5. *Initiation*—The monthly compensation guarantee payment will be the responsibility of an interim service operator from the date of the start-up of interim operations until its proposed acquisition is allowed, denied or withdrawn, or until the employee's eligibility terminates, whichever occurs first. The successful purchaser will have responsibility for monthly compensation guarantees once the proposed transaction is consummated, until the employee's eligibility terminates.

6. *Elections*—Nothing in this agreement shall be construed as depriving any employee of the purchasing carrier whose employment relationship began prior to the effective date of this agreement of any rights or benefits or eliminating

any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, however, that if a protected employee otherwise is eligible for protection under both this agreement and some other job security or other protective conditions or arrangements, he shall elect between protection under this agreement and, for so long as he continues to be protected under the arrangement which he so elects, he shall not be entitled to any protection or benefit (regardless of whether or not such benefit is duplicative) under the arrangement which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement.

7. *Seasonal Work*—In computing the monthly compensation guarantee for employees who, during the period beginning June 1, 1978 and ending on May 31, 1979, did not hold a job on a year-round basis due to seasonal requirements, their monthly compensation guarantee will be computed using the actual number of months assigned to work in such period. Such guarantee as thus computed will apply to the same number of months each year after commencing work with a purchasing carrier.

Article IV. Miscellaneous

1. *Effect of Severance Payment*—This agreement shall not apply to any bankrupt carrier employee who has elected to receive a severance payment under any other protective conditions or agreement.

2. *Health and Welfare Coverage*—The purchasing carrier will pay a premium under the national health and welfare, dental and supplemental sickness plan, for the first month of employment of bankrupt carrier employees accepting employment pursuant to this agreement with the purchasing carrier.

3. Milwaukee or Rock Island employees accepting employment with a purchasing carrier pursuant to this agreement will be given credit for service with the former employer in computing vacation qualification, entry rates and sick leave.

4. This agreement shall be construed as a separate agreement by and on behalf and each of the carriers signatory hereto and its employees represented by each of the organizations signatory hereto.

Signed at Washington, D.C., this 4th day of March, 1980.

APPENDIX F

Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*

§ 565. Protective arrangements for employees

(a) Duty of railroads; discontinuance of intercity rail passenger service. A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 [45 USCS §§ 545, 562] of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act [45 USC § 561(a)(1)] between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees fair in-

cluding affected terminal employees, and equitable protection by the railroad.

(c) **Commencement of protection.** Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and eighty days after assumption of operations by the Corporation.

(d) **Obligations of contractors; minimum wages; labor, health, and safety standards.** The Corporation shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this title [45 USC §§ 561 et seq.] shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The Corporation shall not enter into any such contract or agreement without first obtaining adequate assurance that required labor standards will be maintained on the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) [40 USC § 333] shall be applicable to all construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act shall be considered as being in compliance with the Davis-Bacon Act.

(e) Contracts not to result in layoff. The Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service upon the date of enactment of this Act [enacted Oct. 30, 1970] and any labor organization, if such contracting out shall result in the layoff of any employee or employees in such bargaining unit.

(f) Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroads; retroactive relief after October 1, 1981; "railroad employee" defined. The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this Act, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. Unless the Corporation and a railroad or group of railroads agree on a different basis for compensation, the Corporation shall, during the 2-year period beginning on the effective date of the Amtrak Reorganization Act of 1979 [enacted Oct. 1, 1979], be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-

rate transportation [and any other costs incurred by the Corporation in connection with free or reduced-rate transportation.] Nothing in this subsection, shall preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the defendents of any employee referred to in clause (1) or (2) of this sentence.